80-6127

IN THE

SUPREME COURT OF THE UNITED STATES

FEBRUARY TERM, 1981

NO. A-542

RECEIVED
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SUPREME COURT, U.S.

ROBERT HENRY McDOWELL,

PETITIONER,

VERSUS

THE STATE OF NORTH CAROLINA,

RESPONDENT.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Robert Henry McDowell, who is now confined in North Carolina Central Prison at Raleigh, North Carolina, asks leave of this Court to file the attached Petition For A Writ of Certiorari to the Supreme Court of North Carolina without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The petitioner's affidavit and counsel's affidavit in support of this motion are attached hereto.

WHEREFORE, petitioner, Robert Henry McDowell, requests that he be granted leave to proceed in forma pauperis in this Court.

DATE: JANUARY 29, 1981

RESPECTFULLY SUBMITTED,

F. JEFFERSON WARD, JR.
1412 Elm Street (P.O. Box 1650)
Sanford, North Carolina 27330
Telephone: (919) 776-5133

IN FORMA PAUPERIS AFFIDAVIT

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES
No. A-542
[Insert appropriate court]

Robert Henry McDowell
(Petitioner)

v.

STATE OF NORTH CAROLINA,
(Respondent(s))

AFFIDAVIT IN SUPPORT
OF REQUEST
TO PROCEED
IN FORMA PAUPERIS

I, Robert Henry McDowell, being first duly sworn, depose and say that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes [ ] No [X]
   a. If the answer is "yes", state the amount of your salary or wages per month, and give the name and address of your employer.

   b. If the answer is "no," state the date of last employment and the amount of the salary and wages per month which you received.
   July 20, 1979 - $575.00 per month

2. Have you received within the past twelve months any money from any of the following sources?
   a. Business, profession or form of self-employment? Yes [ ] No [X]
   b. Rent payments, interest or dividends? Yes [ ] No [X]
   c. Pensions, annuities or life insurance payments? Yes [ ] No [X]
   d. Gifts or inheritances? Yes [ ] No [X]
   e. Any other sources? Yes [ ] No [X]

   If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months.

3. Do you own cash, or do you have money in a checking or savings account?

   Yes [ ] No [X] (Include any funds in prison accounts.)

   If the answer is "yes," state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   Yes [ ] No [X]

   If the answer is "yes," describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Robert Henry McDowell
(Petitioner's signature)

State of North Carolina.

County (City) of Wake.

Robert Henry McDowell, being first duly sworn under oath,
(Name of Petitioner)
presents that he has read and subscribed to the above and states that the information therein is true and correct.

Robert Henry McDowell
Signature of Petitioner
(Required as to each petitioner)

Subscribed and sworn to before me this

26 day of January, 19 81.

PAUL R. HUGHES NOTARY PUBLIC WAKE COUNTY, N.C.

My Commission Expires April 22, 1984

Paul R. Hughes
Notary Public or other person authorized to administer an oath

CERTIFICATE

I hereby certify that the petitioner herein has the sum of $ NONE on account to his credit at the Central Prison institution where he is confined. I further certify that petitioner likewise has the following securities to his credit according to the records of said Central Prison institution: NONE

Paul R. Hughes Correctional Sgt
Authorized Officer of Institution, Correctional Sergeant

IN THE

SUPREME COURT OF THE UNITED STATES

FEBRUARY, 1981

NO. A-542

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ROBERT HENRY McDOWELL,

Petitioner,

-v-

STATE OF NORTH CAROLINA,

Respondent.

AFFIDAVIT IN SUPPORT OF
MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

F. Jefferson Ward, Jr., being first duly sworn according to law, deposes and says:

1. I am the counsel for petitioner in his Petition for a Writ of Certiorari to the Supreme Court of North Carolina.

2. In addition to the information contained in the petitioner's affidavit in support of his motion for leave to proceed in forma pauperis, I submit the following in support of petitioner's motion. Petitioner was found to be an indigent in the Superior Court of Lee County, North Carolina, and the undersigned was appointed to represent the Petitioner. In October, 1979, James W. Hoyle, attorney at law, Sanford, North Carolina, was appointed in the Superior Court of Lee County, North Carolina, as co-counsel. On December 11, 1979, Mr. Hoyle and the undersigned were appointed by Superior Court Judge Donald L. Smith to represent Petitioner in appeal to the North Carolina Supreme Court. Petitioner was sentenced to death by the Superior Court of Johnston County, North Carolina on a charge of first-degree murder. The Supreme Court of North Carolina affirmed petitioner's conviction and sentence. The present proceeding has been commenced, pursuant to 28 U.S.C. §1257(3), by a petition for a writ of certiorari to the Supreme Court of North Carolina on grounds that (1) petitioner's death sentence was imposed by a capital sentencing proceeding in which the sentencing discretion of the jury was virtually unguided, in violation of the Eighth and Fourteenth Amendments.

F. Jefferson Ward, Jr.

F. JEFFERSON WARD, JR.

Subscribed and sworn to

before me this 29th day

of January, 19 81.

Janet T. Carter

Notary Public

My Commission Expires: 09-13-81

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IN THE

SUPREME COURT OF THE UNITED STATES

FEBRUARY TERM, 1981

NO. A-542

ROBERT HENRY McDOWELL, Petitioner,

V.

STATE OF NORTH CAROLINA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

F. JEFFERSON WARD, JR.
1412 ELM STREET (P.O. BOX 1650)
SANFORD, NORTH CAROLINA 27330
(919) 776-5133

COUNSEL FOR PETITIONER

JANUARY 29 , 1981

QUESTION PRESENTED

WHETHER THE JURY AT PETITIONER'S CAPITAL TRIAL WAS GIVEN VIRTUALLY UNRESTRAINED, UNGUIDED DISCRETION TO SENTENCE HIM TO DEATH, IN VIOLATION OF THE EIGHTH AND FOURTEEN AMENDMENTS, BY NORTH CAROLINA GENERAL STATUTE 15A-2000, AND THE NORTH CAROLINA SUPREME COURT'S APPROVAL OF SUCH STATUTE IN THAT THE JURY WAS NOT AND IS NOT REQUIRED TO LIST ALL MITIGATING CIRCUMSTANCES WHICH IT MAY FIND.

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IN THE

SUPREME COURT OF THE UNITED STATES

FEBRUARY TERM, 1981

NO. A-542

ROBERT HENRY McDOWELL,

Petitioner,

VERSUS

STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

The petitioner, ROBERT HENRY McDOWELL, prays that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina affirming the conviction and sentence of death. The judgment of the Supreme Court of North Carolina was entered on November 4, 1980, in State of North Carolina v. Robert Henry McDowell, No. 80; No petition for rehearing was filed with the North Carolina Supreme Court as Rule 31(g) of the North Carolina Rules of Appellate Procedure provides "No Petition in Criminal Cases. The Courts will not entertain petitions for rehearing in criminal cases."

OPINION BELOW

The opinion of the Supreme Court of North Carolina has not yet been reported. The official citation of the opinion is State v. Robert Henry McDowell, ____S.E. 2d ____(N.C. 1980; No. 80). The opinion is attached hereto as Appendix A.

JURISDICTION

The judgment and opinion of the Supreme Court of North Carolina were filed on November 4, 1980, and execution date of November 21, 1980, was set. On November 17, 1980, an order staying the execution upon pendancy of a petition for a Writ of Certiorari to the United States Supreme Court was signed by Joseph Branch, Chief Justice of the North Carolina Supreme Court, a copy of which is attached hereto as Appendix B.

This Court's jurisdiction to review by writ of certiorari is invoked under 28 U.S.C. §1257(3).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the North Carolina General Statutes:

North Carolina General Statute 15A-2000:

Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

North Carolina General Statute 15A2000(d):

(d) Review of Judgment and Sentence.

(1) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina pursuant to procedures established by the Rules of Appellate Procedure. In its review, the Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal.

(2) The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court upon a finding that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or upon a finding that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The Supreme Court may suspend consideration of death penalty cases until such time as the court determines it is prepared to make the comparisons required under the provisions of this section.

North Carolina General Statute 15A-2000(f)(9)

(f) Mitigating Circumstances. Mitigating circumstances which may be considered shall include, but not be limited to, the following:

(9) Any other circumstance arising from the evidence which the jury deems to have mitigating value. (1977, c. 406, s.2.)

STATEMENT OF THE CASE

On July 14, 1979, Carol Ann Hinson, age 4, and Patsy Ann Mason, age 14, were living in the house located at 224 Maple Avenue, Sanford, North Carolina, with John and Sarah Mason. John and Sarah are Patsy's parents and Carol's step-grandfather and grandmother, respectively. After playing outside in the yard part of that day and watching some television that night, the two girls went to their bedroom some time after 11:00 P.M. that night leaving John asleep in his bedroom. The Masons' bedroom and the girls' bedroom are separated by two bathrooms. The girls' bedroom has a door leading to a little entryway which has an outside door which opens onto Third Street in Sanford, North Carolina. At some point between 11:00 P.M., July 14, 1979, and 1:00 A.M., July 15, 1979, they heard a knock on the outside door. They went to open it and saw a man standing there. He then came into the bedroom. The man had a big knife in his hand and two pipes with chains on them in his back pocket and stated he had gotten there on a bicycle. After some discussion he stated he was going to rape Patsy. Patsy stated he was not. At some point Carol tried to leave the room, and the man grabbed her and threw her on the double bed in the room. Patsy took Carol in her arms and the man began to hit them with the knife. He then left. Around 1:00 A.M., John Mason woke up and went to check on the girls. He had heard nothing unusual. When he got to the girls' bedroom, he noticed the outside door was open and went over and closed it. When he turned around he saw Patsy sitting on the commode in the bathroom and noticed that she was injured. He ran back to his bedroom and told his wife to call the rescue squad. He then went back into the bedroom and saw Carol at the foot of the bed. There was blood in the bathroom and on the floor. He picked Carol up, went back through the house and out the front door where he met Officers Klomparens and Brown of the Sanford Police Department. Officer Klomparens assisted Mr. Mason in putting Carol in the rescue squad ambulance. He then assisted Officer Brown in helping Patsy to the ambulance.

Patsy and Carol were then taken to Lee County Hospital. Carol was pronounced dead at the hospital, and Patsy was taken to Duke Hospital, Durham, North Carolina, for treatment.

When Robert Henry McDowell, the defendant in this matter, was placed on parole he executed a parole agreement, a condition of which required that Robert "report promptly to (his) parole officer when instructed to do so and in the manner prescribed by (his) parole officer and the Parole Commission."

He was, therefore, on July 20, 1979, in technical custody of the N.C. Parole Commission for the reason that all parolees are technically in the custody of said commission.

On Friday, July 20, 1979, Charles Mann, who is employed with the adult division of Probation and Parole, Department of Corrections, and who was the parole officer of Robert Henry McDowell, the defendant in this case, went to Robert's place of employment at Carolina Macomber, Inc., Sanford, North Carolina, and asked Harold Adcock, Robert's supervisor, if he could see Robert. Mr. Adcock brought Robert to see Mr. Mann. Mann told Robert that he needed to have a recent photo of Robert made for his (Mann's) files. Mann told Robert that one or two judges had requested that a recent photo be placed in the file. Robert went down to Mr. Mann's office after he got off work and three photos of him were made, at least one of which showed Robert with his toboggan cap on and one with it off. Previously that day, Friday, July 20, 1979, Mann had had a conversation with Gene Stewart, an agent with the North Carolina SBI during which he learned that Robert was under investigation by the SBI and the Sanford Police Department for the offenses involved in this matter. Stewart asked Mann if he could look at his file on Robert and did so. After seeing the photo of Robert in the file, Stewart asked Mann if he could get an updated photo of Robert. Mann was aware at the time that the photo was to be used for identification purposes but he did not advise Robert of that. He told Robert only that he needed a photo to update his file. After the photos were taken, Mann turned the camera over to the Sanford Police Department who then developed it. This was different from the normal procedure of Mann sending the film to Fayetteville, North Carolina, to be developed.

After the film was developed, a picture was placed in a manila folder with six other photos of black males and that folder along with another folder with seven photos of black males was taken by Agent Stewart to Duke Hospital on the night of Friday, July 20, 1979. The folder without Robert's photo contained seven photos which were obviously "mug shots" from the files of the Sanford Police Department. The folder with Robert's photo contained seven photos, five of which had the same background and two had varying backgrounds, one of these two being Robert's photo.

Upon arriving at Duke, Agent Stewart went to the room of Patsy Ann Mason. Agent Mary Shepp of the SBI was already there and had been there for quite a while. Agent Stewart instructed Patsy to see if she could point out in the photos

in the manila folders the person who had assaulted her. She pointed out the photo of Robert.

On Saturday, July 21, 1979, a search warrant for the premises of Frances Jenkins was obtained by John Walker, who was at that time an agent with the SBI. Robert had been living with Mrs. Jenkins and her two children, a daughter, six, and a son, two, for approximately nine months prior to this incident. The search warrant was executed with the following items being found: ten-speed bicycle, pair of nunchukhs, a machete, a flashlight, black visor cap, pair of check cutoff pants and a pair of men's purple underpants. Blood was found on the machete and visor cap, but it could not be identified as human origin. The visor was at home when Frances returned before Robert came in. Human blood was found on the flashlight, but it could not be identified. Robert was arrested on July 21, 1979. No fingerprints were found of defendant.

The case first came on for trial for the November 13, 1979, Term in Lee County, North Carolina, which case ended in a mistrial. The case was then transferred to Johnston County, North Carolina, for trial on December 3, 1979. On Tuesday, December 11, 1979, the guilt phase of the trial was concluded with the jury finding petitioner McDowell guilty of first degree murder and assault with deadly weapon with intent to kill inflicting serious injury. The trial then proceeded to the sentencing phase. In the sentencing phase the jury found aggravating circumstances which were identified and mitigating circumstances but failed to state what the mitigating circumstances were. The jury also found that the aggravating circumstances outweighed the mitigating circumstances and recommended the death penalty. See Appendix D.

HOW FEDERAL QUESTION WAS RAISED BELOW

On appeal, the Supreme Court of North Carolina must, pursuant to North Carolina General Statute 15A-2000(d) (Appendix C) automatically review in every case involving the death penalty the punishment and any errors assigned on appeal. In addition in the oral argument before the North Carolina Supreme Court it was argued that it was error for the death sentence to be imposed when mitigating circumstances were found by the jury but it was not stated as to what the mitigating circumstances were.

REASONS FOR GRANTING THE WRIT

THE JURY AT PETITIONER'S CAPITAL TRIAL WAS GIVEN VIRTUALLY UNRESTRAINED, UNGUIDED DISCRETION TO SENTENCE HIM TO DEATH, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, BY NORTH CAROLINA GENERAL STATUTE 15A-2000, AND THE NORTH CAROLINA SUPREME COURT'S APPROVAL OF SUCH STATUTE IN THAT THE JURY WAS NOT AND IS NOT REQUIRED TO LIST ALL MITIGATING CIRCUMSTANCES WHICH IT MAY FIND.

In Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), the United States Supreme Court held that the Eighth and Fourteenth Amendments to the United States Constitution invalidate any scheme for the imposition of the death penalty when either the judge or jury is permitted to impose that sentence as a matter of unbridled discretion. After the Furman decision, a number of states enacted new statutes pertaining to the imposition of the death penalty.

The statutory provisions for imposing the death penalty were upheld in Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); Proffit v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976); Jurek v. Texas, 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976). Each of these cases shared a similar characteristic: each left the decision to impose the death penalty to the guided discretion of either the judge or the jury.

North Carolina has adopted a death penalty statute modeled upon the Georgia statute approved in Gregg, but in cases where juries find "Any other circumstances arising from the evidence which the jury deems to have mitigating value," (North Carolina General Statute 15A-2000(f)(9)), the juries have not been given proper guidance in how to apply such mitigating circumstances against aggravating circumstances. Consequently, the "guided discretion" doctrine propounded in Gregg, Proffitt and Jurek appear to be infringed upon to the extent it is not applicable in those cases where "any other mitigating circumstance or circumstances" are found by a jury.

North Carolina General Statute 15A-2000(d)(2) provides:

> "The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court (of North Carolina) upon a finding that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or upon finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor ... "

In North Carolina v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979), the North Carolina Supreme Court stated "If, however, the jury finds that any of the statutory aggravating circumstances exist, it must determine whether they outweigh

any mitigating circumstances in a sufficiently substantial number so as to call for the imposition of the death penalty." See State v. Barfield, 298 N.C. at 351, 259 S.E.2d at 542.

In this case in response to the issue of "Are there any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value?" the jury answered "Yes." (See Issues and Recommendations As To Punishment attached as Appendix D). The jury did not, nor was it required by statute to state what the mitigating circumstance or circumstances were. It seems very difficult then to determine if under North Carolina General Statute 15A-2000(d)(2) "the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor ..." or if the mitigating circumstances are outweighed in a "sufficiently substantial manner so as to call for the imposition of the death penalty." North Carolina v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979). How can an appellate court determine if the jury has indeed used "guided discretion" when it does not know all the basis of the jury's decision? There is no way to determine the method and rationale used by the jury in reaching its decision, hence how can it be determined if it was arbitrary? No where was there any guidance to the jury as to whether to consider the mitigating versus the aggravating circumstances in either a qualitative or quantitative sense. It is submitted the jury could have computed thusly: three aggravating circumstances against one or two mitigating circumstances, therefore, the aggravating circumstances outweigh the mitigating circumstances. It seems the rationale gleaned from Gregg, Proffitt and Jurek require juries to have sufficient guidance to prevent arbitrary decisions but if appellate courts don't know the full basis of the decision, that is, what mitigating circumstances as opposed to what aggravating circumstances were found and whether or not the comparison is qualitative or quantitative then the appellate courts cannot determine if, in fact, the jury has exercised "guided discretion."

The sentencer's discretion must be channelled by "clear and objective standards that provide specific and detailed guidance and that make rationally reviewable the process for imposing a death sentence." Godfrey v. Georgia, ____U.S.____, 100 S. Ct. 1759 at 1764-65 (1980). It is submitted that it cannot be determined if the sentencer's discretion was properly channelled if the basis for the sentencer's decision or the rationale of his decision is not known. Also, the process for imposing a death penalty cannot rationally be

reviewed if the reviewer does not know the full basis for the decision.

Further, North Carolina General Statute 15A-2000(d)(1) provide for automatic review by the Supreme Court of North Carolina when the sentence of death is involved and that the punishment shall be reviewed.[1] Of what purpose is automatic review if the appellate court does not know what comparisons were made or the extend of said comparisons, if any? Again, if mitigating circumstances found by the jury are not known how can an appellate court determine if "guided discretion" was involved? How can there be meaningful appellate review? It is submitted that North Carolina General Statute 15A-2000 et seq. is not requiring the jury to state what mitigating circumstances it finds in violation of the Eighth and Fourteenth Amendments.

CONCLUSION

For the reasons stated herein, petitioner respectfully requests that a writ of certiorari be granted.

JANUARY 29, 1981

RESPECTFULLY SUBMITTED

F. Jefferson Ward, Jr.

F. JEFFERSON WARD, JR.
1412 ELM STREET (P.O. BOX 1650)
SANFORD, NORTH CAROLINA 27330
Attorney for Petitioner

1 North Carolina General Statute 15A-2000 (d)(1) reads as follows: "The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina pursuant to procedures established by the Rules of Appellate Procedure. In its review, the Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal."

APPENDIX A

IN THE SUPREME COURT OF NORTH CAROLINA FALL TERM 1980

STATE OF NORTH CAROLINA)
)
v.) No. 80 - From Johnston
)
ROBERT HENRY McDOWELL)

Appeal by defendant from judgments of Smith, J., entered at the 3 December 1979 Criminal Session of Johnston Superior Court.

Having entered pleas of not guilty, defendant was tried upon bills of indictment proper in form which charged him with the crimes of (1) first-degree murder and (2) assault with a deadly weapon with intent to kill inflicting serious injury. The trial was conducted in the bifurcated manner mandated by G.S. § 15A-2000 et seq. Phase one of the trial determined the guilt or innocence of defendant. Phase two of the trial was held to determine his sentence for first-degree murder following his conviction of that charge.

During the guilt determination phase of trial, the state introduced evidence which tended to show:

On 14 July 1979, Carol Ann Hinson, age four, and Patsy Ann Mason, age fourteen, were living in the home of Patsy's parents, John and Sarah Mason, in Sanford, North Carolina. The Masons were Carol's step-grandparents. Sometime after 11:00 p.m., on said date, the girls went to bed.

The two girls shared the same bedroom. At some point between the time they went to bed and 1:00 a.m., they were awakened by a knock on the door at the end of an entryway which led from their bedroom to the outside. Both girls got out of bed and went to the door.

Without asking the identity of the early-morning caller, ~~Carol~~ Patsy opened the door slightly and saw a man. The visitor was a black man with large eyes and a big nose; he was wearing a dark pullover shirt and blue jeans and his hair was plaited. ~~Carol~~ Patsy identified defendant as being the man she had seen standing outside of the door that morning. At the time he was first seen by the two girls, defendant was carrying a machete which Patsy described as being approximately two feet long.

As Patsy tried to close the door, defendant entered the house.

Upon entering the house, defendant greeted both girls by their names, even though Patsy had never seen him before that night. Defendant went into the girls' bedroom and sat upon the bed. As the girls sat down on the bed, defendant began talking with them, specifically asking Patsy if she would like to go bicycle riding with him. Patsy insisted that she could not go bicycling with him.

After declining defendant's invitation to go bicycling, Patsy observed that defendant still held a machete in his hand. Upon telling Patsy that he had purchased the knife at a discount store in Sanford, defendant asked her if her parents were asleep. After Patsy replied affirmatively, defendant warned her to be quiet and not make any noise otherwise he would cut her with the knife.

Throughout this time, defendant had been tickling Carol. After warning Patsy to remain still, defendant made two attempts to get Carol to leave the room by suggesting that she go to the bathroom. In both instances, the child refused to follow the suggestion. After each attempt to get the four-year-old out of the room, defendant turned to Patsy and told her that he was going to rape her. On both occasions, Patsy rebuffed his statement. In the first instance, defendant did nothing except resume tickling the younger child, Carol. After the second instance, however, as Carol was making her way out of the bedroom, defendant grabbed her and threw her on the bed whereupon Patsy picked her up and held her in her lap.

As Patsy held Carol in her arms, defendant began to strike at the children with the machete. Despite the protests and other resistance of the two girls, defendant continued his attack upon them. After Patsy was struck on her head by defendant's knife, she lost consciousness which she did not regain until she awoke as a patient at Duke Medical Center in Durham. While she was at the Medical Center, she was treated for injuries which included lacerations about her head, as well as to a wrist and several fingers. After inflicting numerous wounds to the two children, defendant left the house.

At approximately 1:00 a.m., Mr. Mason awoke. He had fallen asleep at about 11:00 p.m. while he was watching television. It was his custom to look in on the children before he went to bed each night. As he walked through the kitchen towards the girls' bedroom, Mr. Mason observed that the outside door at the end of the entryway was open. After shutting the door, he turned around and saw Patsy sitting in a nearby bathroom. Patsy's face was covered with blood and the bathroom had been bloodied from her wounds. After wiping Patsy's face with a washcloth so that she could see, Mr. Mason went to the bedroom which he shared with his wife and awakened her. Upon telling his wife to summon the rescue squad because "something had happened to the children", Mr. Mason went into the girls' bedroom and found Carol lying at the foot of a bed. Carol was pronounced dead on arrival at Lee County Hospital in Sanford. A subsequent autopsy revealed that she had been wounded nine times. Six of the wounds were to her head; her left arm had been cut at least three times; and on her right hand, her thumb, as well as her index finger, had been amputated at the middle joint.

Defendant did not offer any evidence.

Defendant was found guilty as charged and the court convened a sentencing hearing before the same jury in order to determine the sentence to be imposed on the murder conviction. During this phase of the trial, the state introduced evidence which tended to show that defendant had pled guilty to a charge of second-degree murder in Cumberland County in 1970. On 31 October 1977, he was paroled and until the time of his arrest on 21 July 1979, he was under the supervision of the Department of Correction.

During the sentencing hearing, defendant presented evidence which tended to show that after his release from prison, he had been employed in the Sanford area as a welder. Those with whom defendant worked testified that he had a good work record and got along well with others.

Issues with respect to punishment were submitted to and answered by the jury as follows:

Issue One:

Do you unanimously find from the evidence, beyond a reasonable doubt, that one or more of the following aggravating circumstances existed at the time of the commission of this murder?

ANSWER: Yes.

(1) Had Robert Henry McDowell been previously convicted of a felony involving the use of violence to the person?

ANSWER: Yes.

(2) Was this murder especially heinous, atrocious or cruel?

ANSWER: Yes.

(3) Was this murder for which defendant stands convicted part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against another person?

ANSWER: Yes.

Issue Two:

Do you unanimously find from the evidence beyond a reasonable doubt that the aggravating circumstance or circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?

ANSWER: Yes.

Issue Three:

Do you find one or more mitigating circumstances?

ANSWER: Yes.

(1) Robert Henry McDowell has no significant history of prior criminal activity.

ANSWER: No.

(2) Are there any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value?

ANSWER: Yes.

Issue Four:

Do you unanimously find that the mitigating circumstances are insufficient to outweigh the aggravating circumstances?

ANSWER: Yes.

The jury recommended that a sentence of death be imposed upon the defendant. Pursuant thereto the court imposed the death sentence.

On the felonious assault charge, defendant was sentenced to twenty years imprisonment.[1]

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Lester V. Chalmers, Jr., for the state.

F. Jefferson Ward, Jr., for defendant-appellant.[2]

BRITT, Justice.

We find no prejudicial error in either phase of defendant's trial and conclude that the verdicts and judgments should not be disturbed.

PHASE I - GUILT DETERMINATION

By his first assignment of error, defendant contends that the trial court erred in denying his motion for the appointment of additional counsel from Johnston County. There is no merit in this assignment.

It is manifest that the state has the responsibility to provide an indigent defendant with the effective assistance of counsel and the other necessary resources which are incident to presenting a defense in a criminal prosecution. G.S. § 7A-450 (1969); State v. Barfield, 298 N.C. 306, 259 S.E. 2d 510 (1979). However, the right of a criminal defendant to court appointed counsel does not include the right to require the court to appoint more than one attorney unless there is a clear showing that the interests of the defendant are not being adequately represented by the counsel already appointed. State v. Barfield, supra. While this precept embodies a consistent standard of proof to guide its implementation, it is apparent that its application will produce conclusions which will vary depending upon the nature of individual cases. It is with this consideration in mind that we turn to a brief examination of the facts of the present case as they relate to this assignment of error.

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[1]Defendant's motion to bypass the North Carolina Court of Appeals on the assault conviction was allowed by this court 5 March 1980.

[2]In addition to Mr. Ward, defendant was also represented at trial and on appeal by the Honorable J. W. Hoyle of Sanford. However, Mr. Hoyle died between the time defendant's brief was filed and the time the appeal was argued.

Although defendant was indicted by the Lee County Grand Jury, he was convicted at a trial which was held in Johnston County. Defendant was initially brought to trial in Lee County in November 1979. However, after the jury had been impaneled, there was an attempted jailbreak in Sanford which received extensive attention from the news media. Upon motion of defense counsel, the presiding judge declared a mistrial and ordered a change of venue to Johnston County where the case was brought on for trial on 3 December 1979.

The essence of defendant's argument is that his right to due process of law could be effectively safeguarded only by the appointment of an attorney from Johnston County. Defendant contends that such an attorney would be in a superior position to assist defense counsel, who were members of the Lee County bar, in the selection of a jury. In support of his argument, defendant suggests that the district attorney was in an unfair strategic position to try this case in that he was a native of Johnston County, and, as such, he was better equipped to select a jury which would be sympathetic to the state's case. We are not impressed with this argument.

Upon a finding of indigency, defendant had been provided with the services of court-appointed counsel. In fact, by the time defendant's case was called for trial, the initial appointment of counsel had evolved to the point where defendant was represented by two court-appointed attorneys. Together with Harnett County, Lee and Johnston Counties constitute the Eleventh Judicial District. It is commonplace in North Carolina for attorneys who live in one county to try cases in other counties in their judicial district, as well as in other districts of the state. Several of our judicial districts are composed of rural counties whose populations are of a low to medium density. Though the geographical dimensions of these districts may be rather substantial, the demographics of the population within a particular district will be generally consistent throughout the unit. With the development of modern communications, as well as the

construction of an extensive transportation system, many attorneys no longer confine their practices to the areas immediately surrounding their homes.

It is apparent from the record before us that the crimes which resulted in judgments against defendant are of such a nature as to provoke interest among residents in the area in the subsequent proceedings against defendant. The possibility of an irreparably prejudiced venire was vitiated by the change of venue which removed the prosecution to Johnston County. While the change of venue did nothing to lessen the severity of the crimes or the seriousness of the accusations against defendant, the change of venue did serve to place the prosecution in an area less likely to be tainted with preconceived notions about defendant's guilt or innocence, particularly in light of the attempted jailbreak in Sanford. Nor would a venire which was drawn from the population of Johnston County be as likely to have individuals who were interested in the disposition of this case because of affinity or consanguinity.[3] It would seem, therefore, that Johnston County was a more favorable venue from the standpoint of the defendant's right to a fair trial notwithstanding the fact that the district attorney was a resident of that county.

In summary, while it remains the law of this state that there may be situations in which the right to the effective assistance of counsel can be safeguarded only by the appointment of additional counsel, State v. Barfield, supra, such a situation is not present in this case. There has been no showing that the burdens which were shouldered by defense counsel in the representation of their client were so disproportionate to that borne in the usual course of criminal defense work required the court to appoint another attorney to provide assistance.

By his second assignment of error, defendant contends that the trial court erred in denying his motion to suppress a photographic

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[3]According to the 1970 census, Johnston County has a land area of 797 square miles and a population of 61,737 which is 77 percent rural. North Carolina Manual 136 (1979).

identification of him which was made by Patsy Ann Mason. In support of this contention, defendant offers three distinct grounds for his objection, suggesting that the procedure in question violated his rights under the Fourth, Fifth, and Sixth Amendments to the United States Constitution. We find no merit in this assignment.

In 1970, defendant pleaded guilty to a charge of second-degree murder in Cumberland County. In 1977, he was placed on parole, subject to continued supervision by the Department of Correction. A condition of his parole required defendant to report promptly to his parole officer when instructed to do so, as well as in the manner prescribed by his parole officer.

On 20 July 1979, Charles Mann was a parole officer with the Department of Correction and was supervisor of parole officers in Lee and Harnett Counties. In that capacity, he served as immediate supervisor of defendant's parole officer. It is the policy of the Department of Correction to maintain up-to-date photographs of parolees in its files. On 20 July 1979, the only photograph of defendant in the files of the department had been taken on 26 May 1976.

Before 20 July 1979, the files of the Sanford probation office had been routinely available to law enforcement officers in general, and agents of the State Bureau of Investigation in particular. On 20 July 1979, agents of the S.B.I. informed Mr. Mann that defendant was a suspect in the investigation of the murder of Carol Ann Hinson and the assault of Patsy Ann Mason. Accordingly, they requested that Mr. Mann allow them to review defendant's parole file. The request was granted. Upon making the ensuing review of the file, agents of the S.B.I., as well as officers of the Sanford Police Department, requested that Mr. Mann secure a more recent photograph of defendant for their use.

On the afternoon of 20 July 1979 between the hours of 3:00 and 3:30, Mr. Mann went to defendant's place of employment, Brackett Steel Company. Mr. Mann asked defendant to report to the parole office to have his picture taken. The officer told defendant that the files were being updated and that the picture which the files

already contained was not current. Later that same day, defendant reported to the office as he had been instructed to do.

After the photograph was made and a print was developed, law enforcement officers prepared two manilla folders containing various photographs. The photographs portrayed black men whose hair was braided or plaited. The second folder contained a series of photographs of black men whose complexions varied and whose clothing differed. The photograph of defendant that had been obtained at the probation office was placed in the second folder.

Both folders were taken to Duke Medical Center where they were displayed before Patsy Ann Mason. There is no evidence in the record which would tend to suggest that the photograph of defendant was in any way singled out by the officers for the special attention of Patsy. The girl picked out defendant's photograph within moments of opening the second folder.

Defendant made a pretrial motion to suppress the photographic identification. After conducting a voir dire, the court overruled defendant's motion. There was no error.

Defendant initially contends that the photographic identification ought to be suppressed because the procedure violated his Sixth Amendment right to counsel. We disagree. The Sixth Amendment right to counsel attaches only upon the initiation of adversary judicial criminal proceedings, whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. Kirby v. Illinois, 406 U.S. 682, 32 L. Ed. 2d 411, 92 S. Ct. 1877 (1972); State v. Matthews, 295 N.C. 265, 245 S.E. 2d 727 (1978), cert. denied, 439 U.S. 1128 (1979); State v. Finch, 293 N.C. 132, 235 S.E. 2d 819 (1977). At the time defendant was photographed, he had not been formally charged with any offense. While it is true that the investigation had narrowed its focus upon him, it had not so progressed that the state had committed itself to prosecute. It is only when the defendant finds himself confronted with the prosecutorial resources of the state arrayed against him and immersed in the complexities of a formal criminal prosecution that the Sixth Amendment

right to counsel is triggered as a guarantee.

Nor was defendant's Fifth Amendment privilege against self-incrimination violated when he was photographed in the parole office. It is well established that routine police procedures such as the taking of handwriting samples, blood samples, fingerprints, and hair samples from a defendant, as well as the taking of his photograph are outside the scope of the Fifth Amendment guaranty because the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature. Schmerber v. California, 384 U.S. 757, 16 L. Ed. 2d 908, 86 S. Ct. 1826 (1966); State v. Wilson, 296 N.C. 298, 250 S.E. 2d 621 (1979); State v. Wright, 274 N.C. 84, 161 S.E. 2d 581 (1968), cert. denied, 396 U.S. 934 (1969).

Similarly, we are not persuaded that defendant's Fourth Amendment rights were violated by the taking of his photograph. The Fourth Amendment offers no shield for that which an individual knowingly exposes to public view. Katz v. United States, 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967); State v. Leggette, 292 N.C. 44, 231 S.E. 2d 896 (1977). It follows, therefore, that an individual's personal traits, such as his facial appearance or the tone and manner of his voice, are not within the purview of the Fourth Amendment's protection against unreasonable searches and seizures. One does not have a reasonable expectation of privacy in those features which serve to distinguish one individual from another and which are exposed to the view of others as a matter of course. United States v. Dionisio, 410 U.S. 1, 35 L. Ed. 2d 67, 93 S. Ct. 764 (1973); Davis v. Mississippi, 394 U.S. 721, 22 L. Ed. 2d 676, 89 S. Ct. 1394 (1969); State v. Sharpe, 284 N.C. 157, 200 S.E. 2d 44 (1973).

In a related assignment of error, defendant contends that the trial court erred by failing to suppress his in-court identification by Patsy Ann Mason. This assignment is without merit.

During her direct examination, Patsy was asked if she saw the man who had come into her bedroom on the evening of 14 July 1979 seated in the courtroom. Over objection, she was permitted to identify defendant. Defendant now argues that the trial court should have ordered a voir dire at that point so that he could have inquired as to her opportunity to view her assailant, as well as the manner in which she identified defendant's photograph among those which she viewed in her hospital room at Duke Medical Center.

The record reveals that defendant made a pretrial motion to suppress any identification of him by Patsy. After a voir dire was held, the trial judge made findings of fact and conclusions of law in an order which denied defendant's motion. While it is true that Patsy did not testify at the hearing, no right of defendant was denied by the proceeding. The gist of defendant's complaint is that he was denied the opportunity to question the prosecuting witness as to the circumstances surrounding her photographic identification of him, as well as her opportunity for observation of her assailant. In no way can it be said that defendant was denied his right of confrontation. There is no requirement that the state call any particular witness at a voir dire which is held on a motion to suppress. The evidence which was adduced at the voir dire does not in any way suggest that defendant's photograph was singled out for the special attention of Patsy. Furthermore, the record does not suggest that defendant was prevented from calling Patsy as a witness at voir dire. Defendant's lack of an opportunity to question the prosecuting witness in this regard stemmed not from the action of the court but from a tactical decision made on his behalf prior to trial.

By his third assignment of error, defendant contends that the trial court erred in denying him the opportunity to make an opening statement. There is no merit in this assignment.

G.S. § 15A-1221(a)(4) provides that the defendant in a criminal case, as well as the state, must be given the opportunity to make a

brief opening statement. The record before us in the present case is completely silent with respect to any mention by either the trial court or defense counsel concerning an opening statement. It is well established that a defendant may waive the benefit of statutory or constitutional provisions by express consent, failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it. State v. Gaiten, 277 N.C. 236, 176 S.E. 2d 778 (1970). It follows that in order for an appellant to assert a constitutional or statutory right on appeal, the right must have been asserted and the issue raised before the trial court. State v. Parks, 290 N.C. 748, 228 S.E. 2d 248 (1976). In addition, it must affirmatively appear on the record that the issue was passed upon by the trial court. City of Durham v. Manson, 285 N.C. 741, 208 S.E. 2d 662 (1974); State v. Braswell, 283 N.C. 332, 196 S.E. 2d 185 (1973). By his failure to request the opportunity to make an opening statement, defendant engaged in conduct inconsistent with a purpose to insist upon the exercise of a statutory right. Therefore, his conduct at trial amounts to a waiver of this procedural right.

Defendant's fourth assignment of error relates to the testimony of John Earl Mason. Mr. Mason testified that after Carol's body had been removed from his house and Patsy had been taken to a hospital for treatment, he and his wife were taken to the Sanford Police Department so that they could make several phone calls. While they were at the police station, the Masons talked by telephone with Cliff Ferguson, a friend of Terry Hinson, the mother of Carol. The Mason couple had adopted Carol and her brother, Jerome. Ms. Hinson was the daughter of Mrs. Mason. Ms. Hinson had instructed the couple to call Mr. Ferguson's home in the event that she was needed. On cross-examination of Mr. Mason, defendant sought to establish that Mr. Ferguson was killed the next day. The objection of the district attorney was sustained, and Mr. Mason was not permitted to answer the question.

There was no error. Defendant argues that the evidence was relevant to establish the violent atmosphere which surrounded the Mason household in that it tended to establish a connection between

two deaths, that of Carol Ann Hinson and that of Cliff Ferguson. The only connection between the two deaths that has been demonstrated to this court is the relationship of the decedents to Terry Hinson. Ms. Hinson not only was Carol's mother, she was also a friend of Mr. Ferguson. No other connection is apparent or has been demonstrated. While it remains the general rule that evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue, e.g., State v. Banks, 295 N.C. 399, 245 S.E. 2d 743 (1978), no such tendency exists in regard to a purported connection between the two deaths. Indeed, such evidence, nothing else appearing, would have done nothing in the present case except confuse the issues before the jury.

Similarly, it was not error for the trial court to refuse to permit defendant to cross-examine Mr. Mason with respect to whether he was the beneficiary of any insurance on Carol's life. In the absence of the jury, Mr. Mason testified that an insurance company had paid him the sum of $5,000 upon the child's death. We are unable to agree with defendant's contention that the evidence was relevant on the question of a motive Mr. Mason would have had in regard to the death of Carol. Such an argument is purely speculative in that it finds no support whatsoever in the record. Evidence that a crime was committed by another must point unerringly to the guilt of another. State v. Jenkins, 292 N.C. 179, 232 S.E. 2d 648 (1977); State v. Smith, 211 N.C. 93, 189 S.E. 175 (1937). Evidence which does no more than cast suspicion upon another or to raise a mere conjectural inference that the crime may have been committed by another is inadmissible. State v. Shinn, 238 N.C. 535, 78 S.E. 2d 388 (1953).

Defendant also contends that the trial court erred in its charge to the jury in two respects. He first submits that evidence favorable to him which had been elicited on cross-examination was not summarized for the jury as was the case with evidence favorable to the state. This contention is controlled by State v. Moore,

____ N.C. ____, ____ S.E. 2d ____ (No. 4, Fall Term 1980), in which we held that while a trial judge must summarize evidence favorable to defendant which is brought out on cross-examination, there is no requirement that this be done when the evidence goes not to the establishment of a substantive defense but rather is of an impeaching quality and effect.

In the present case, the trial judge failed to instruct the jury, among other things, that no bloodstains had been found on defendant's bicycle, his underclothing, or on the nunchukas which had been seized by police. Nor did the trial judge undertake to direct the jury's attention to the fact that Patsy had worn glasses since the first grade or that she was unable to say that the state's exhibit 8, a set of nunchukas, was the weapon which she had seen in the back pocket of her assailant. All of this evidence, while competent, goes to affect the weight to be accorded these matters rather than the establishing of a substantive defense, as was the case in State v. Sanders, 298 N.C. 512, 259 S.E. 2d 258 (1979).

Similarly, it was not error for the trial judge to instruct the jury that while defendant had elected not to present any evidence, they were not to allow that decision to influence their deliberations. We have repeatedly held that while it is the better practice for a trial judge not to instruct on a defendant's election not to testify or otherwise offer evidence absent a request, such an instruction does not constitute reversible error. E.g., State v. Covington, 290 N.C. 313, 226 S.E. 2d 629 (1976).

PHASE II - SENTENCE DETERMINATION

Although defendant has not brought forward and argued to this court any assignment of error which relates to the submission of a particular aggravating circumstance to the jury, in view of the penalty that has been imposed, we have carefully considered those which were submitted. We conclude that the trial court did not err in this respect. See State v. Barfield, supra; State v. Goodman, 298 N.C. 1, 257 S.E. 2d 569 (1979).

As a check against the capricious or random imposition of the death penalty, G.S. § 15A-2000(d)(2) authorizes this court to review

the record in a capital case to determine whether the record supports the jury's finding of any aggravating circumstance, whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

We have carefully reviewed the record of defendant's trial. We have given serious consideration to the briefs and arguments which have been presented to us. It is our conclusion that there is sufficient evidence in the record to support the jury's findings as to the aggravating circumstances which were submitted to it. Nothing in the record suggests that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.

Considering the brutal manner in which Carol Ann Hinson was murdered and Patsy Ann Mason was seriously injured, and considering defendant's prior history of violent criminal behavior, we conclude that the sentence of death in this case is not excessive and that we should not exercise the discretion given us by statute to set aside the sentence imposed.

No error.

Justice Brock took no part in the consideration or determination of this case.

APPENDIX B

No. 80 ELEVENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Fall Term 1980

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STATE OF NORTH CAROLINA	)	
	)	
v	)	From Johnston
	)	No. 79CRS15665
ROBERT HENRY McDOWELL	)	

ORDER STAYING EXECUTION OF DEATH SENTENCE

Defendant was indicted for first-degree murder and convicted at the December 3, 1979 Criminal Session of Johnston County Superior Court. Defendant was sentenced to death in an order entered by Judge Donald L. Smith on December 11, 1979.

In an opinion filed November 4, 1980, this Court found no error in either the guilt-determination phase or sentencing phase of defendant's trial. Defendant's death sentence was thus undisturbed. Defendant's attorney filed with this Court on November 17, 1980, a motion for stay of execution of the death sentence on the ground that he intends to file a petition for writ of certiorari in the Supreme Court of the United States pursuant to Rule 22 of that Court.

It is therefore ORDERED:

1. That defendant's execution be and the same is hereby stayed pending further orders of this Court.
2. That defendant shall remain in the custody of the Department of Correction pending further orders of this Court.
3. That defendant serve a copy of his petition to the Supreme Court of the United States on the Attorney General of North Carolina and the Clerk of this Court.

4. That a certified copy of this order be served on the Warden of Central Prison in Raleigh, North Carolina.

This the 17th day of November 1980.

Joseph Branch

JOSEPH BRANCH, CHIEF JUSTICE
SUPREME COURT OF NORTH CAROLINA

The foregoing order is issued over my hand and seal of the Supreme Court this 17th day of November, 1980.

John R. Morgan

John R. Morgan
Clerk of the Supreme Court
of North Carolina

cc: Lester V. Chalmers, Jr., Special Deputy Attorney General
T. Jefferson Ward, Attorney at Law
John W. Twisdale, District Attorney
Will R. Crocker, Clerk of Superior Court
Warden of Central Prison

A TRUE COPY

CLERK

BY Terry E. Watkins

Nov 17 '80

APPENDIX C

80-6127

North Carolina General Statute 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence. -- (a) Separate Proceedings on Issue of Penalty. --

(1) Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. A capital felony is one which may be punishable by death.

(2) The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the trial jury begins its deliberations on the issue of penalty, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which he was selected. If the trial jury is unable to reconvene for a hearing on the issue of penalty after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue of the punishment. If the defendant pleads guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. A jury selected for the purpose of determining punishment in a capital case shall be selected in the same manner as juries are selected for the trial of capital cases.

(3) In the proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is impaneled, but all such evidence is competent for the jury's consideration in passing on punishment. Evidence may be presented as to any matters relating to any matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (e) and (f). Any evidence which the court deems to have probative value may be received.

(4) The State and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The defendant or defendant's counsel shall have the right to the last argument.

(b) Sentence Recommendation by the Jury. -- Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.

If the jury cannot within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.

(c) Findings in Support of Sentence of Death. -- When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and

(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,

(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

(d) Review of Judgment and Sentence. --

(1) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina pursuant to procedures established by the Rules of Appellate Procedure. In its review, the Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal.

(2) The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court upon a finding that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or upon a finding that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The Supreme Court may suspend consideration of death penalty cases until such time as the court determines it is prepared to make the comparisons required under the provisions of this section.

(3) If the sentence of death and the judgment of the trial court are reversed on appeal for error in the post-verdict sentencing proceeding, the Supreme Court shall order that a new sentencing hearing be conducted in conformity with the procedures of this Article.

(e) Aggravating Circumstances. -- Aggravating circumstances which may be considered shall be limited to the following:

(1) The capital felony was committed by a person lawfully incarcerated.

(2) The defendant had been previously convicted of another capital felony.

(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person.

(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(6) The capital felony was committed for pecuniary gain.

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(8) The capital felony was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duty.

(9) The capital felony was especially heinous, atrocious, or cruel.

(10) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commissic by the defendant of other crimes of violence against another perso. or persons.

(f) Mitigating Circumstances. -- Mitigating circumstances which may be considered shall include, but not be limited to, the following:

(1) The defendant has no significant history of prior criminal activity.

(2) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act.

(4) The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

(7) The age of the defendant at the time of the crime.

(8) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.

(9) Any other circumstance arising from the evidence which the jury deems to have mitigating value. (1977, c. 406, s. 2.)

APPENDIX D

STATE OF NORTH CAROLINA

COUNTY OF JOHNSTON

IN THE GENERAL COURT OF JUST

SUPERIOR COURT DIVISION

FILE # 79 CrS 15665

STATE OF NORTH CAROLINA)
Plaintiff)
)
VS)
)
Robert Henry McDowell)
Defendant)

ISSUES AND RECOMMENDATION

AS TO PUNISHMENT

ISSUES

Issue One:

Do you unanimously find from the evidence, beyond a reasonable doubt, that one or more of the following aggravating circumstances existed at the time of the commission of this murder?

ANSWER YES

BEFORE YOU ANSWER ISSUE ONE, CONSIDER EACH OF THE FOLLOWING AGGRAVATING CIRCUMSTANCES. IN THE SPACE AFTER EACH AGGRAVATING CIRCUMSTANCE, WRITE "YES," IF YOU UNANIMOUSLY FIND THAT AGGRAVATING CIRCUMSTANCE FROM THE EVIDENCE BEYOND A REASONABLE DOUBT. WRITE, "NO," IF YOU DO NOT FIND THAT AGGRAVATING CIRCUMSTANCE FROM THE EVIDENCE BEYOND A REASONABLE DOUBT.

IF YOU WRITE, "YES," IN ONE OR MORE OF THE SPACES AFTER THE FOLLOWING AGGRAVATING CIRCUMSTANCES, WRITE, "YES," IN THE SPACE AFTER ISSUE ONE AS WELL. IF YOU WRITE, "NO," IN ALL OF THE SPACES AFTER THE FOLLOWING AGGRAVATING CIRCUMSTANCES, WRITE, "NO," IN THE SPACE AFTER ISSUE ONE.

(1) Had Robert Henry McDowell been previously convicted of a felony involving the use of violence to the person?

ANSWER YES

(2) Was this murder especially heinous, atrocious or cruel?

ANSWER YES

(3) Was this murder for which defendant stands convicted part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against another person. ANSWER YES

IF YOU ANSWERED ISSUE ONE "NO," SKIP ISSUES TWO, THREE AND FOUR, AND INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT", ON THE LAST PAGE OF THIS FORM. IF YOU ANSWERED ISSUE ONE, "YES" PROCEED TO IS TWO.

Issue Two:

Do you unanimously find from the evidence beyond a reasonable doubt that the aggravating circumstance or circumstances found by you are sufficiently substantial to call for the

imposition of the death penalty?

ANSWER yes

IF YOU ANSWER ISSUE TWO, "NO," SKIP ISSUES THREE AND FOUR, AND INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT" ON THE LAST PAGE OF THIS FORM. IF YOU ANSWER ISSUE TWO "YES," PROCEED TO ISSUE THRE

Issue Three:

Do you find one or more mitigating circumstances?

ANSWER yes

BEFORE YOU ANSWER ISSUE THREE, CONSIDER EACH OF THE FOLLOWING MITIGATING CIRCUMSTANCES. IN THE SPACE AFTER EACH MITIGATING CIRCUMSTANCE WRITE YE AS TO THOSE YOU FIND TO EXIST BY THE PREPONDERANCE OF THE EVIDENCE AND N IN THE SPACE PROVIDED FOR THOSE THAT YOU DO NOT SO FIND.

IF YOU FIND ONE OR MORE OF THE MITIGATING CIRCUMSTANCES FROM THE EVIDENC WRITE, "YES," IN THE SPACE AFTER ISSUE THREE, ABOVE. IF YOU DO NOT FIN ANY MITIGATING CIRCUMSTANCES, WRITE, "NO," IN THAT SPACE.

(1) Robert Henry McDowell has no significant history of prior criminal activity.

ANSWER: NO

(2) Are there any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value?

ANSWER: yes

ANSWER ISSUE FOUR WHETHER YOU ANSWERED ISSUE THREE, "YES" OR "NO."

Issue Four

Do you unanimously find that the mitigating circumstances are insufficient to outweigh the aggravating circumstances?

ANSWER yes

IF YOU ANSWER ISSUE FOUR, "NO," INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT." IF YOU ANSWER ISSUE FOUR, "YES," INDICATE YOUR RECOMMENDATION UNDER "RECOMMENDATION AS TO PUNISHMENT."

RECOMMENDATION AS TO PUNISHMENT

INDICATE YOUR RECOMMENDATION AS TO PUNISHMENT BY WRITING "LIFE IMPRISONM OR "DEATH," IN THE BLANK IN THE FOLLOWING SENTENCE:

We, the jury, unanimously recommend that the defendant, Robert Henr McDowell be sentenced to Death

This 11 day of December

David Ricky Baldwin (signa
Foreman of the Jury

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SUPREME COURT, U.S.

NO. 80-6127

IN THE

SUPREME COURT OF THE UNITED STATES

FEBRUARY TERM, 1981

ROBERT HENRY McDOWELL,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

RESPONSE TO PETITION FOR
WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA

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QUESTION PRESENTED

WHETHER THE JURY AT PETITIONER'S CAPITAL TRIAL WAS GIVEN VIRTUALLY UNRESTRAINED, UNGUIDED DISCRETION TO SENTENCE HIM TO DEATH, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, BY NORTH CAROLINA GENERAL STATUTE §15A-2000, AND THE NORTH CAROLINA SUPREME COURT'S APPROVAL OF SUCH STATUTE IN THAT THE JURY WAS NOT AND IS NOT REQUIRED TO LIST ALL MITIGATING CIRCUMSTANCES WHICH IT MAY FIND.

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IN THE

SUPREME COURT OF THE UNITED STATES

February Term, 1981

NO.80-6127

ROBERT HENRY McDOWELL,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

RESPONSE TO PETITION FOR
WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA

Pursuant to the authority of Rule 22 and in the manner provided by Rule 46.5 of the Supreme Court Rules [for response to petitions filed "in forma pauperis"], the State of North Carolina responds to the petition of Robert Henry McDowell and prays that this Court deny such petition on the basis of the facts and the authorities hereinafter set forth for the Court's consideration.

CITATION TO OPINION BELOW

The Petitioner was tried, convicted and judgment of death was entered in the Superior Court of Johnston County, North Carolina. In an opinion reported in State v. McDowell, ____ N.C. ____, 271 S.E. 2d 286 [No. 80 - Fall Term], the Supreme Court of North Carolina affirmed the judgment of death.

JURISDICTION

Petitioner invokes the jurisdiction of the Supreme Court of the United States pursuant to Title 28, United States Code, Section 1257(3).

QUESTION PRESENTED

WHETHER THE JURY AT PETITIONER'S CAPITAL TRIAL WAS GIVEN VIRTUALLY UNRESTRAINED, UNGUIDED DISCRETION TO SENTENCE HIM TO DEATH, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, BY NORTH CAROLINA GENERAL STATUTE §15A-2000, AND THE NORTH CAROLINA SUPREME COURT'S APPROVAL OF SUCH STATUTE IN THAT THE JURY WAS NOT AND IS NOT REQUIRED TO LIST ALL MITIGATING CIRCUMSTANCES WHICH IT MAY FIND.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States:

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV

§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. This case also involves the following provisions of the General Statutes of North Carolina:

> "§14-17. . . .A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed

in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon, shall be deemed to be murder in the first degree, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life as the court shall determine pursuant to G.S. 15A-2000."

§15A-2000 [See Appendix C of Petitioner's Petition for Writ of Certiorari.]

STATEMENT OF CASE

The Respondent adopts as its own, as if fully set out herein, the facts stated by the Supreme Court of North Carolina in its opinion in State v. McDowell, ____ N.C. ____, 271 S.E. 2d 286 [No. 80 - Fall Term], a copy of which is attached to the Petition for Writ of Certiorari as Appendix A.

REASONS WHY THE WRIT SHOULD NOT ISSUE

I. FAILURE TO RAISE THE FEDERAL QUESTION FOR TIMELY REVIEW BY THE NORTH CAROLINA SUPREME COURT.

The Respondent, State of North Carolina, respectfully submits that the Petitioner failed to raise and fairly present, in the Supreme Court of North Carolina, the constitutional issue that he now seeks to have this Court decide. Rules 28(a) and (b) of the North Carolina Rules of Appellate Procedure [287 N.C. 671 (1975)] indicate that any question of law not presented and discussed by defendant in his brief will be deemed abandoned. The North Carolina Supreme Court has ruled that defendant waives any error, including constitutional error, when he fails to assert the same on direct appeal of his case to the appellate courts of this State. State v. White, 274 N.C. 220 (1968) [See also State v. Browder and Johnson, 293 N.C. 259 (1977); State v. Crowder, 293 N.C. 259 (1977); State v. Jackson, 293 N.C. 260 (1977); State v. May, 293 N.C. 261 (1977); and State v. Riddick, 293 N.C. 261 (1977)].

It is essential to the jurisdiction of this Court under §1257 that a substantial federal question has been properly raised in the State court proceedings. For the purpose of certiorari under subsection (3), the validity of a State statute must have been "drawn in question" or a federal title, right, privilege or immunity must have been "specifically set up or claimed." As stated in Mr. Justice Harlan's dissent in Amalgamated Food Employees' Union v. Logan Valley Plaza, 391 U.S. 308 at 334 (1968), in determining whether a question was "specifically set up or claimed" within the meaning of §1257(3), "it is relevant and usually sufficient to ask whether petitioners satisfied the State rules governing presentation of issues." And the proper method of raising the federal question is dependent upon the particular State practice, at least as long as the litigant thereby has a reasonable opportunity to have such an issue heard and determined. Michel v. Louisiana, 350 U.S. 91 (1955); Parker v. Illinois, 333 U.S. 571 (1948); Pennsylvania Railroad Co. v. Illinois Brick Co., 297 U.S. 447 (1936); Central Union Telephone Co. v. Edwardsville, 269 U.S. 190 (1925).

Once a substantial federal question has been properly framed, it becomes important that it be raised at the proper point in the State court proceeding. Beck v. Washington, 369 U.S. 541 (1962); Godchaux Co. v. Estopinal, 251 U.S. 179 (1919). In Mr. Justice Harlan's words: "The rule that in cases coming from State courts this Court may review only those issues which were presented to the State court is not discretionary but jurisdictional." Amalgamated Food Employees' Union v. Logan Valley Plaza, supra. It has long been established that this Court is vested with no jurisdiction unless a federal question was raised and decided in the State court below. Cardinale v. Louisiana, 394 U.S. 437 (1969); Crowell v. Randell, 35 U.S. (10 Pet.) 285 (1836).

The jurisdictional factor is especially significant where the highest State court fails or refuses to pass expressly

upon the federal question. In that situation, the party invoking this Court's jurisdiction has the burden of showing that he properly raised the question so that the State court's failure to deal with it was not for want of proper presentation. This Court has stated many times that when "the highest State court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the State courts, unless the aggrieved party in this Court can affirmatively show the contrary." Street v. New York, 394 U.S. 576 (1969). And Rule 21(1)(h) states that the petitioner seeking review of a State court decision in this Court, in meeting this burden, must "specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; . . ."

The litigant must follow the State procedures in raising the federal question. Any failure to do so is fatal. The federal question must be pursued to the highest State courts and must be pursued in the manner and with the degree of specificity required by the State Rules of Practice. See Beck v. Washington, supra. "Without doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the State law and practice in this regard are no less applicable where federal rights are in controversy than when the case turns entirely upon questions of local or general law." John v. Paullin, 231 U.S. 583 (1913).

Thus, a waiver will be implied if the litigant fails to obey a State rule of procedure requiring the federal constitutional issues to be raised in the trial court and again for review directly in the State Supreme Court. Parker v. Illinois, supra. A waiver has also been found where the litigant fails to list the federal issue among the "assignments of error" in his brief filed in the State Supreme Court or to argue the

point in that brief. Beck v. Washington, supra. And where a party fails to raise a constitutional issue in the "statement of the questions presented" in its brief to the State Supreme Court, as required by court rule in order for the issue to be considered, and where the constitutional issue was not otherwise argued in the brief or even mentioned in the State court opinion, this Court will decline to consider that issue. Amalgamated Food Employees' Union v. Logan Valley Plaza, supra.

The Respondent respectfully submits that the Petitioner, neither in his brief [Appendix A - Brief of McDowell filed in the North Carolina Supreme Court], nor on oral argument to the Supreme Court of North Carolina, suggested that there was a constitutional basis for him to receive a new trial based upon Phase II - Sentence Determination. The Respondent respectfully calls to this Court's attention the opinion below, Petitioner's Appendix A, at page 14, wherein the North Carolina Supreme Court stated:

> "Although defendant has not brought forward and argued to this court any assignment of error which relates to the submission of a particular aggravating circumstance to the jury, in view of the penalty that has been imposed, we have carefully considered those which were submitted. We conclude that the trial court did not err in this respect. See State v. Barfield, supra; State v. Goodman, 298 N.C. 1, 257 S.E. 2d 569 (1979)."

In Street v. New York, 394 U.S. 576, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969) this Court stated:

> "In order to vindicate our jurisdiction to deal with this particular issue, we must inquire whether that question was presented to the New York courts in such a manner that it was necessarily decided by the New York Court of Appeals when it affirmed appellant's conviction. If the question was not so presented, then we have no power to consider it. See 28 U.S.C. §§1257(2), 1257(3); Bailey v. Anderson, 326 U.S. 203, 206-207, 90 L. Ed. 3, 5-6, 66 S. Ct. 66 (1945). Moreover, this Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary. See, e.g. Bailey v. Anderson, supra;

Chicago, I. & L. R. Co. v. McQuire, 196 U.S. 128, 131-133, 49 L. Ed. 413, 415-417, 25 S. Ct. 200 (1905)."

In the concurring opinion of Mr. Justice White in Chambers v. Mississippi, 410 U.S. 284, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973), it was stated:

> "We would not ordinarily expect an appellate court in the state or federal system to remain silent on a constitutional issue requiring decision in the case before it. Normally, a court's silence on an important question would simply indicate that it was unnecessary to decide the issue because it was not properly before the court or for some other reason. As my Brother Rehnquist points out, the Court stated in Street v. New York, 394 U.S. 576, 582, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969), that 'when . . . the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show to the contrary.'
>
> Under this rule it becomes the petitioner's burden to demonstrate that under the applicable state law his claim was properly before the state court and was therefore necessarily rejected, although silently, by affirmance of the judgment. If he fails to do so, we need not entertain and decide the federal question that he presses."

The Respondent respectfully submits that Petitioner has not carried the burden of demonstrating to this Court that under the applicable state law his claim was properly before the Supreme Court of North Carolina and was rejected, although silently, by the affirmance of the judgment and that since he has failed to do so this Court should not now entertain and decide the federal question that he now presses.

In the dissenting opinion of Mr. Justice Rehnquist in Chambers it is stated:

> "28 U.S.C. §1257 [28 USCS §1257] provides in pertinent part as follows:
>
> > 'Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
> >
> > * * * *
> >
> > (3) By writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed

under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.'

We deal here with a limitation imposed by Congress upon this Court's authority to review judgments of state courts. It is a jurisdictional limitation, Cardinale v. Louisiana, 394 U.S. 437, 438, 22 L. Ed. 2d 398, 89 S. Ct. 1161 (1969), that has always been interpreted with careful regard for the delicate nature of the authority conferred upon this Court to review the judgments of state courts of last resort:

> 'Upon like grounds the jurisdiction of this court to reexamine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right.' Oxley Stave Co. v. Butler County, 166 U.S. 648, 655, 41 L. Ed. 1149, 17 S. Ct. 709 (1897).'"

In Chambers, Mr. Justice Rehnquist further stated in his dissent:

> "In Bailey v. Anderson, 326 U.S. 203, 90 L. Ed. 3, 66 S. Ct. 66 (1945), the petitioner argued in this Court that a state court condemnation award that failed to include interest from the date of possession denied him just compensation in violation of the Due Process Clause of the Fourteenth Amendment. This Court noted that in the state circuit court petitioner had requested that the award include interest from the date of taking, and that the circuit court without explanation had rejected this claim. But this Court went on to say:
>
> > 'But throughout the proceedings in the circuit court appellant made no claim to interest on constitutional grounds, and made no attack on the constitutionality of the award or the court's decree because of the asserted denial of interest.' 326 U.S. at 206, 90 L. Ed 3."

In Picard v. Connor, 404 U.S. 270, 30 L. Ed. 2d 438, 92 S. Ct. 509, Mr. Justice Brennan, speaking for the Court, stated:

> "We emphasize that the federal claim must be fairly presented to the state courts. If the exhaustion doctrine is to prevent 'unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution,' Ex parte Royall, supra, at 251,

29 L. Ed. at 871, it is not sufficient merely that the federal habeas applicant has been through the state courts. The rule would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts. Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies. Accordingly, we have required a state prisoner to present the state courts with the same claim he urges upon the federal courts. See Darr v. Burford, supra, at 203, 94 L. Ed. at 766; Davis v. Burke, 179 U.S. 399, 401-403, 45 L. Ed. 249, 250-251, 21 S. Ct. 210 (1900)." (Emphasis added)

In Chambers, Mr. Justice Rehnquist in his dissent concluded by stating:

"This Court under the Constitution has the extraordinarily delicate but equally necessary authority to review judgments of state courts of last resort on issues that turn on construction of the United States Constitution or federal law. But before we undertake to tell a state court of last resort that its judgment is inconsistent with the mandate of the Constitution, it behooves us to make certain that in doing so we adhere to the congressional mandate that limits our jurisdiction. Believing as I do that petitioner has not complied with 28 U.S.C. §1257(3) [28 USCS §1257(3)], I would dismiss the writ of certiorari."

See also Edelman v. California, 344 U.S. 357, 97 L. Ed. 387, 73 S. Ct. 293 (1953), and Irvine v. California, 347 U.S. 128, 98 L. Ed. 561, 74 S. Ct. 381 (1954).

The Respondent respectfully submits that the Petitioner, having failed to timely raise this issue in the State appellate court, has waived the relief he now seeks by this petition.

II. THERE IS NO CONSTITUTIONAL REQUIREMENT THAT THE JURY PUT IN WRITING ITS FINDINGS OF OTHER CIRCUMSTANCES ARISING FROM THE EVIDENCE WHICH THE JURY DEEMS TO HAVE MITIGATING VALUE AND THE JURY IS NOT GIVEN UNRESTRAINED AND UNGUIDED DISCRETION TO RECOMMEND THAT THE DEFENDANT BE SENTENCED TO DEATH PURSUANT TO THE PROVISIONS OF NORTH CAROLINA GENERAL STATUTE §15A-2000.

A. In State v. Johnson, 298 N.C. 47, 72, 257 S.E. 2d 597, the Supreme Court of North Carolina held that any other relevant circumstance proffered by the defendant as having mitigating value which is supported by the evidence and which the jury may reasonably deem to have mitigating value must, upon defendant's timely request, also be submitted to the jury in writing. Justice Exum, speaking for the Court, stated:

> "If, however, a defendant makes a timely request for a listing in writing of possible mitigating circumstances, supported by the evidence, and if these circumstances are such that the jury could reasonably deem them to have mitigating value, we are of the opinion that the trial judge must put such circumstances on the written list.
>
> The legislature did not intend to give those mitigating circumstances expressly mentioned in the statute primacy over others which might be included in the 'any other circumstance' provision. Such an intent, if it existed, might run afoul of Lockett v. Ohio, supra, 438 U.S. 586. In Lockett Ohio's death penalty statute was found unconstitutional under the Eighth and Fourteenth Amendments because the Ohio sentencing authority could consider only three mitigating factors and none other. The Supreme Court concluded, id. at 604-05, 608:
>
> > 'that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death . . . . The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in non-capital cases . . . . The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.
> >
> > 'There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite

> of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.
>
> . . . .
>
> 'To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors.' (Emphasis original.)

A footnote to the quoted sections of Lockett provides, 'Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record or the circumstances of his offense.' Id. at 604 n. 12.

Under Lockett a legislature would be free to provide that the existence of certain mitigating factors would preclude the imposition of the death penalty, while the existence of others should simply be considered, but not as controlling, on the question. A death penalty sentencing statute, however, which by its terms or the manner in which it is applied, puts some mitigating circumstances in writing and leaves others to the jury's recollection might be constitutionally impermissible under the reasoning of Lockett. For if the sentencing authority cannot be precluded from considering any relevant mitigating circumstance supported by the evidence neither should such circumstances be submitted to it in a manner which makes some seemingly less worthy of consideration than others.

Thus we are satisfied that our legislature intended that all mitigating circumstances, both those expressly mentioned in the statute and others which might be submitted under G.S. 15A-2000(f)(9), be on equal footing before the jury. If those which are expressly mentioned are submitted in writing, as we believe they should be, then any other relevant circumstance proffered by the defendant as having mitigating value which is supported by the evidence and which the jury may reasonably deem to have mitigating value must, upon defendant's timely request, also be submitted in writing.

Since, however, defendant made no specific request to include possible 'other mitigating circumstances' on the written verdict form submitted to the jury and, likewise, made no timely request to include defendant's good character as a mitigating circumstance, we find no error in the actions of the trial judge in failing to do these things."

The Petitioner did not tender to the trial court a timely request to include possible "other mitigating circumstances" on the written verdict form submitted to the jury and made no

request that the judge instruct the jury to write out "other mitigating circumstances" which it found may have mitigating value on the written verdict form. (R.p. 119) The Petitioner did not bring forward and argue in his brief (Respondent's Appendix A) before the Supreme Court of North Carolina the failure of the trial judge to include possible "other mitigating circumstances" on the written verdict form submitted to the jury nor did he bring forward and argue in his brief before the Supreme Court of North Carolina the failure of the trial judge to instruct the jury to write out "other mitigating circumstances" which it found may have mitigating value on the written verdict form.

The Respondent submits that to require the jury to submit in writing "other mitigating circumstances" would inhibit the jury and, in effect, "bridle" them from considering "other mitigating circumstances" which they may consider and deem to have mitigating value in making their recommendation with respect to punishment.

B. G.S. §15A-2000 was considered and reviewed by the Supreme Court of North Carolina in State v. Barfield, 298 N.C. 306, 259 S.E. 2d 510, cert. denied, ____ U.S. ____, 65 L. Ed. 2d 1137, 100 S. Ct. 3050. Justice Britt, speaking for the Court, stated:

> ". . . We conclude that the present North Carolina death penalty statutes overcome the problems identified in Woodson.
>
> First, the determination of guilt is entirely divorced from the imposition of punishment. Though the same jury that made the determination of guilt may make the determination of punishment, it makes that determination at a different time, subject to a different set of instructions from the trial judge. Therefore, the issue of jury nullification of the instructions of the court by refusing to convict of the capital offense is diffused. In making the finding of guilt or innocence, the jury now does not invariably weigh the probable punishment. In addition, the evidence that it considers in the punishment phase of trial is not necessarily the same as that it dealt with in finding the defendant guilty. Though it may consider evidence previously introduced at the

guilt determination stage, it is not limited to that evidence. Additional evidence in mitigation as well as aggravation may be introduced. Additional argument of counsel is permitted. In short, the nature of the bifurcated trial itself serves to prevent the issue of probable punishment from bleeding over into the determination of guilt or innocence. In so providing, the present North Carolina death penalty statutes recognize not only what Justice Stewart perceived to be society's rejection of the mandatory imposition of the death penalty but also the actual conduct of juries in weighing the guilt or innocence of the accused.

Second, while the present statutes serve to diffuse the issue of jury discretion in the process of guilt determination, they also provide for the exercise of guided discretion at the sentencing stage of the proceeding. After hearing the evidence, arguments of counsel, and further instructions of the trial court judge, the jury is required to deliberate and render a binding sentence recommendation to the court. This recommendation is not presented until the jury has engaged in a two-step process. Initially, the jury must determine which of the aggravating and mitigating circumstances exist on the basis of the evidence presented. If it finds that none of the statutory aggravating circumstances exist beyond a reasonable doubt, the inquiry is at an end and the defendant is sentenced to life imprisonment. If, however, the jury finds that any of the statutory aggravating circumstances exist, it must determine whether they outweigh any mitigating circumstances in a sufficiently substantial manner so as to call for the imposition of the death penalty. It is this process that overcomes the problem spotlighted in Woodson: a mandatory death penalty does not allow for the particularized consideration of the relevant aspects of the character and record of a convicted defendant. Furthermore, a mandatory death penalty does not allow the singular characteristics of the conduct found to be criminal to be weighed in the balance in the imposition of sentence as is invariably done in the finding of guilt.

While there is discretion at this stage of the process, it is not discretion that is constitutionally forbidden. It is discretion which is guided by the very language of the statute and the process by which it is implemented. Prior to State v. Waddell, supra, juries had uncontrolled discretion as to the punishment to be imposed in a capital case. A jury then had the power to setence a convicted capital defendant to life imprisonment by so recommending at the time it rendered its verdict. While it is true that the present statute empowers the jury in effect to impose sentence upon the defendant, that decision is not made blindly. No defendant may be sentenced to death unless and until the jury finds at least one statutory aggravating circumstance to exist beyond a reasonable doubt which outweighs any mitigating circumstance in a sufficiently

substantial manner so as to call for the death penalty. No aggravating circumstance which is not provided by the language of the statute may be considered by the jury in imposing sentence. G.S. 15A-2000(e). In this respect, our statute is significantly more narrow than the statute which was upheld in Gregg. The Georgia death penalty statute which was at issue in that case allowed a jury to consider 'any. . . aggravating circumstances otherwise authorized by law and any of [10] statutory aggravating circumstances which may be supported by the evidence. . . .' Ga. Code Ann. §27-2534.1(b) (Supp. 1975). It is apparent that juries operating under the Georgia procedure have greater discretion in imposing the death penalty than do juries in North Carolina. While the present North Carolina statute enumerates several mitigating factors to be considered by the jury, it does not limit the jury in its consideration of mitigating factors. A North Carolina jury is specifically empowered to consider '[A]ny other circumstance arising from the evidence which the jury deems to have mitigating value.' In short, while the jury's discretion to impose the death penalty is sharply limited, it retains wide discretion to consider the particular circumstances of the defendant and his conduct so that the punishment which is ultimately imposed is not grossly disproportionate to the crime. (Emphasis added).

It is clear from the foregoing discussion that the present North Carolina death penalty statutes are not mandatory in nature but instead provide for the exercise of guided discretion in the imposition of sentence."

The Court further went on to say:

"As a check against the capricious or random imposition of the death penalty, this court is empowered to review the record in a capital case to determine whether the record supports the jury's findings of any aggravating circumstance, whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. G.S. 15A-2000(d)(2).

We do not take lightly the responsibility imposed on us by G.S. 15A-2000(d)(2). We have combed the record before us. We have carefully considered the briefs and arguments which have been presented to us. We conclude that there is sufficient evidence in the record to support the jury's findings as to the aggravating circumstances which were submitted to it. We find nothing in the record which would suggest that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. The manner in which death was inflicted and the way in which defendant conducted herself after she administered the poison to Taylor leads us to conclude that the sentence of death is not excessive or disproportionate considering both the crime and the defendant. We,

therefore, decline to exercise our statutory discretion to set aside the sentence imposed."

The Respondent submits that under G.S. §15A-2000 as interpreted and applied by the Supreme Court of North Carolina, the jury is not given unrestrained and unguided discretion in recommending that the defendant be sentenced to death. The Respondent submits that the statute complies with the three general methods of guiding the discretion vested in the sentencing authority under Gregg v. Georgia, 428 U.S. 153, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976); Proffitt v. Florida, 428 U.S. 242, 49 L. Ed. 2d 913, 96 S. Ct. 2960 (1976); and Jurek v. Texas, 428 U.S. 262, 49 L. Ed. 2d 929, 96 S. Ct. 2950 (1976). The Respondent submits that G.S. §15A-2000 provides for a bifurcated trial procedure; that the imposition of the death penalty is limited to cases where the sentencing authority finds at least one aggravating circumstance; that the sentencing authority is left free to consider "any other mitigating circumstances" which it may deem to have mitigating value and further, that the sentence of death can only be imposed if the mitigating circumstances do not outweigh the aggravating circumstances. Under G.S. §15A-2000, the sentencing authority has discretion, but it is also guided by clear and objective standards. The Respondent further submits that G.S. §15A-2000 incorporates the third major safeguard against arbitrariness, i.e. the automatic appeal of all death sentences to the Supreme Court of North Carolina and that the court is enjoined by the statute to review each sentence of death and determine: (1) whether the record supports the jury's findings of any aggravating circumstances or circumstances upon which the sentencing authority based its sentence of death; (2) whether the record reveals that the sentence of death was imposed by the sentencing authority under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the record reveals that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases.

The Respondent submits that the Supreme Court of North Carolina in this case followed the mandate of the statute and determined: (1) that there was sufficient evidence in the record to support the jury's findings as to the aggravating circumstances which were submitted to it; (2) that nothing in the record suggests that the sentence of death was imposed under the influence of passion, prejudice or other arbitrary factors; and (3) that the sentence of death is not excessive. (Opinion below pp. 14-15).

CONCLUSION

The Respondent respectfully submits that the Petitioner's Petition for Writ of Certiorari be denied for that: (1) the Petitioner failed to raise a federal question under the United States Constitution at the trial and on his appeal and (2) that the federal question attempted to be presented in the Petition for Writ of Certiorari has been previously determined by this Court and the decision in this case by the North Carolina Supreme Court is in accord with the applicable decisions of this Court.

Respectfully submitted this 17th day of February, 1981.

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APPENDIX A

No. 49 ELEVENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Term 1980

****

STATE OF NORTH CAROLINA)
)
v.) From Johnston
)
ROBERT HENRY McDOWELL)

****

DEFENDANT APPELLANT'S BRIEF

****

QUESTIONS PRESENTED

WAS ROBERT HENRY McDOWELL MATERIALLY PREJUDICED IN HIS TRIAL BY:

I. FAILURE OF THE COURT TO SUBSTITUTE COUNSEL FROM JOHNSTON COUNTY FOR THE TRIAL OR TO ASSIST IN JURY SELECTION?

II. FAILURE OF THE COURT TO SUPPRESS THE UNCOUNSELED IDENTIFICATION OF ROBERT HENRY McDOWELL THROUGH THE PHOTOGRAPH TAKEN THROUGH THE PAROLE OFFICERS?

III. FAILURE OF THE COURT TO PERMIT AN OPENING STATEMENT?

IV. FAILURE OF THE COURT TO PERMIT JOHN EARL MASON TO TESTIFY CONCERNING CLIFF FERGUSON'S DEATH?

V. FAILURE OF THE COURT TO PERMIT DEFENDANT'S COUNSEL TO CROSS EXAMINE JOHN EARL MASON, PATSY ANN MASON'S FATHER AND CAROL ANN HINSON'S STEP-GRANDPARENT, WITH RESPECT TO LIFE INSURANCE ON CAROL ANN HINSON'S LIFE?

VI. ADMISSION OF THE IDENTITY EVIDENCE BY PATSY ANN MASON OF ROBERT HENRY McDOWELL OVER OBJECTION AND WITHOUT A REQUESTED VOIR DIRE?

VII. THE SUMMARY OF THE EVIDENCE, AS GIVEN BY THE COURT, IN THE INSTRUCTIONS AND THE FAILURE OF THE COURT TO GIVE EVIDENCE FAVORABLE TO ROBERT HENRY McDOWELL, IN THAT DEFENDANT WAS NOT GIVEN EQUAL STRESS WITH THE STATE AND FAVORABLE EVIDENCE OF DEFENDANT WAS NOT GIVEN AND THE LAW ARISING THEREON WAS NOT GIVEN?

VIII. THE COURT EXPRESSING THE OPINION THAT THE DEFENDANT HAD OFFERED NO FAVORABLE EVIDENCE OR ANY EVIDENCE BY CROSS EXAMINATIONS OR OTHERWISE?

STATEMENT OF FACTS

On July 14, 1979, Carol Ann Hinson, age 4, and Patsy Ann Mason, age 14, were living in the house located at 224 Maple Avenue, Sanford, North Carolina, with John and Sarah Mason. John and Sarah are Patsy's parents and Carol's step-grandfather and grandmother, respectively. After playing outside in the yard part of that day and watching some television that night, the two girls went to their bedroom some time after 11:00 P.M. that night leaving John asleep in his bedroom. The Masons' bedroom and the girls' bedroom are separated by two bathrooms. The girls' bedroom has a door leading to a little entryway which has an outside door which opens onto Third Street in Sanford, North Carolina. At some point between 11:00 P.M., July 14, 1979, and 1:00 A.M., July 15, 1979, they heard a knock on the outside door. They went to open it and saw a man standing there. He then came into the bedroom. The man had a big knife in his hand and two pipes with chains on them in his back pocket and stated he had gotten there on a bicycle. After some discussion he stated he was going to rape Patsy. Patsy stated he was not. At some point Carol tried to leave the room, and the man grabbed her and threw her on the double bed in the room. Patsy took Carol in her arms and the man began to hit them with the knife. He then left. Around 1:00 A.M., John Mason woke up and went to check on the girls. He had heard nothing unusual. When he got to the girls' bedroom, he noticed the outside door was open and went over and closed it. When he turned around he saw Patsy sitting on the commode in the bathroom and noticed that she was injured. He ran back to his bedroom and toldhis wife to call the rescue squad. He then went back into

the bedroom and saw Carol at the foot of the bed. There was blood in the bathroom and on the floor. He picked Carol up, went back through the house and out the front door where he met Officers Klomparens and Brown of the Sanford Police Department. Officer Klomparens assisted Mr. Mason in putting Carol in the rescue squad ambulance. He then assisted Officer Brown in helping Patsy to the ambulance.

Patsy and Carol were then taken to Lee County Hospital. Carol was pronounced dead at the hospital, and Patsy was taken to Duke Hospital, Durham, North Carolina, for treatment.

When Robert Henry McDowell, the defendant in this matter, was placed on parole he executed a parole agreement, a condition of which required that Robert "report promptly to (his) parole officer when instructed to do so and in the manner prescribed by (his) parole officer and the Parole Commission." He was, therefore, on July 20, 1979, in technical custody of the N.C. Parole Commission for the reason that all parolees are technically in the custody of said commission.

On Friday, July 20, 1979, Charles Mann, who is employed with the adult division of Probation and Parole, Department of Corrections, and who was the parole officer of Robert Henry McDowell, the defendant in this case, went to Robert's place of employment at Carolina Macomber, Inc., Sanford, North Carolina, and asked Harold Adcock, Robert's supervisor, if he could see Robert. Mr. Adcock brought Robert to see Mr. Mann. Mann told Robert that he needed to have a recent photo of Robert made for his (Mann's) files. Mann told Robert that one or two judges had requested that a recent photo be placed in the file. Robert went down to Mr. Mann's office after he got off work and three photos of him were made, at least one of which showed Robert with his toboggan cap on and one with it off. Previously that day, Friday, July 20, 1979, Mann had had a conversation with Gene Stewart, an agent with the North Carolina SBI during which he learned that Robert was under investigation by the SBI and the Sanford Police Department for the offenses involved in this matter. Stewart asked Mann if he

could look at his file on Robert and did so. After seeing the photo of Robert in the file, Stewart asked Mann if he could get an updated photo of Robert. Mann was aware at the time that the photo was to be used for identification purposes but he did not advise Robert of that. He told Robert only that he needed a photo to update his file. After the photos were taken, Mann turned the camera over to the Sanford Police Department who then developed it. This was different from the normal procedure of Mann sending the film to Fayetteville, North Carolina, to be developed.

After the film was developed, a picture was placed in a manila folder with six other photos of black males and that folder along with another folder with seven photos of black males was taken by Agent Stewart to Duke Hospital on the night of Friday, July 20, 1979. The folder without Robert's photo contained seven photos which were obviously "mug shots" from the files of the Sanford Police Department. The folder with Robert's photo contained seven photos, five of which had the same background and two had varying backgrounds, one of these two being Robert's photo.

Upon arriving at Duke, Agent Stewart went to the room of Patsy Ann Mason. Agent Mary Shepp of the SBI was already there and had been there for quite a while. Agent Stewart instructed Patsy to see if she could point out in the photos in the manila folders the person who had assaulted her. She pointed out the photo of Robert.

On Saturday, July 21, 1979, a search warrant for the premises of Frances Jenkins was obtained by John Walker, who was at that time an agent with the SBI. Robert had been living with Mrs. Jenkins and her two children, a daughter, six, and a son, two, for approximately nine months prior to this incident. The search warrant was executed with the following items being found: ten-speed bicycle, pair of nunchukhs, a machete, a flashlight, black visor cap, pair of check cutoff pants and a pair of men's purple underpants. Blood was found on the machete and visor cap, but it could not be identified as human origin. The visor was at home when Frances returned before Robert came in (R p 51). Human blood was found on the flashlight, but it could not be identified. Robert was arrested on

July 21, 1979 (R p 67). No fingerprints were found of defendant (R p 57).

The case first came on for trial for the November 13, 1979, Term in Lee County, which case ended in a mistrial. The case was then transferred to Johnston County for trial on December 3, 1979. The failure of the Court to appoint Johnston County counsel to try or assist in jury selection is the basis for exceptions. The North Carolina Court of Appeals has been bypassed and both appeals are before the Supreme Court of North Carolina.

ARGUMENTS

I. THE DEFENDANT WAS PREJUDICED BY THE FAILURE OF THE COURT TO APPOINT COUNSEL FROM JOHNSTON COUNTY FOR THE TRIAL OR JURY SELECTION.

ASSIGNMENT OF ERROR 1, EXCEPTION NOS. 1 and 2 (R p 2).

The defendant's counsel were more than 50 miles from home. The case was tried in the District Attorney's county of residence. The District Attorney is a popularly nominated and elected official. This case involved black against Caucasians offenses. The defendant's counsel had no way to plumb empirically or subjectively the attitudes of the panel or the special panel called to try these cases. Effective assistance of counsel involves an awareness of the influences which produce the juror and juror attitude. Counsel and the defendant were strangers. The District Attorney was local, popular and highly regarded. The facts were and are horrible. The jury predictably had no rapport with the defendant or his counsel and they were less credible. A Johnston County jury would have no knowledge of the nuances which surround this case which evidence could not supply. The defendant was convicted on both charges. The black-white relationships and the attitudes of jurors are important herein. Forms, theories and ideas cannot take the place of the awareness which comes from knowledge. It approaches a Fourteenth Amendment Due Process violation to permit the trial without effective assistance of counsel in the jury selection process. It seems that this ought to prejudice enough to warrant a new trial.

II. ROBERT HENRY McDOWELL WAS MATERIALLY PREJUDICED IN HIS TRIAL BY THE FAILURE OF THE COURT TO SUPPRESS THE UNCOUNSELED IDENTIFICATION OF ROBERT HENRY McDOWELL THROUGH THE PHOTOGRAPH TAKEN BY THE PAROLE OFFICERS.

(a) ASSIGNMENT OF ERROR 2, EXCEPTION NO. 4 (R p 26).

The Court erred in not allowing defendant's motion to suppress any and all identifications of Robert Henry McDowell through the photographs in that said exclusion is required by the Constitution of the United States and the Constitution of the State of North Carolina, in that the identifications of Robert Henry McDowell came about as a result of a photographic lineup conducted with photographs taken of Robert Henry McDowell, permission for which was not voluntarily given.

Robert Henry McDowell had no choice but to submit to having a photograph of himself taken pursuant to Charles Lee Mann's instructions on July 20, 1979, for the following reasons:

(1) Robert Henry McDowell was on parole at the time of the instruction by Mr. Mann, that is, July 20, 1979. He, therefore, was under the supervision and control of the North Carolina Parole Commission.

(2) A condition of his parole required that Robert Henry McDowell "report promptly to (his) parole officer when instructed to do so and in the manner prescribed by (his) parole officer and the Parole Commission."

(3) A failure to report to his parole officer as instructed would have constituted grounds for his arrest for a parole violation.

(4) According to uncontradicted evidence Robert Henry McDowell was advised by Charles Lee Mann that one or two judges had requested that a recent photograph of parolees be placed in their respective files, when in fact, that was an untrue statement.

(5) Robert Henry McDowell was in technical custody of the North Carolina Parole Commission on

July 20, 1979, for the reason that all parolees are technically in the custody of said commission.

(6) Robert was without counsel when photo was taken, was not advised of any rights to have counsel, did not waive any rights to counsel. Further, Robert Henry McDowell was under investigation at the time the photograph was obtained.

(b) ASSIGNMENT OF ERROR 3, EXCEPTION NO. 5 (R p 26)

By being in custody and under the supervision and control of the North Carolina Parole Commission, a law enforcement-related body, and being under investigation for a capital crime, Robert Henry McDowell was therefore entitled to counsel under the 4th, 6th and 14th Amendments of the Constitution of the United States before, during and after he was instructed by Charles Lee Mann to report and have his photograph made; that he was not advised of any said rights and had no counsel present and therefore all identifications resulting from or connected with said photograph should be disallowed.

STATE v WILLIAMS, 279 NC 663, 185 SE 2d 174 (1971), page 668, provides:

> "Rules established for in-custody confrontation for identification purposes required that: (1) the accused be warned of his constitutional right to the presence of counsel during the confrontation; (2) when counsel is not knowingly waived and is not present, the testimony of witnesses that they identified the accused at the confrontation be excluded; (3) the in-court identification of the accused by a witness who participated in the pretrial out-of-court confrontation be likewise excluded unless it is first determined on voir dire that the in-court identification is of independent origin and thus not tainted by the illegal pretrial identification procedure. Failure to observe these rules is a denial of due process." STATE v SMITH, 278 NC 476, 481, 180 SE 2d 7, 11 (1971), and cases cited.

Accord: STATE v HARRIS, 279 NC 177, 179-80, 181 SE 2d 420, 421 (1971).

(c) ASSIGNMENT OF ERROR 4 and 5, EXCEPTIONS NOS. 6 and 7 (R p 26).

The State would contend that the photo was to update the file of the parole officer. If that be the case, why did they need three or more pictures taken? It was also obvious that Robert Henry McDowell was a suspect and under investigation in that when the pictures were taken the Sanford Police Department immediately developed the film rather than let Mr. Mann process it through normal channels.

There is no evidence here that Robert Henry McDowell was duly advised that he had a right to have an attorney present at any lineup for identification purposes or that he was duly advised that he had a right to appointment of counsel in the event of indigency or that he ever waived those rights. It is contended, therefore, that Robert Henry McDowell was denied his right to counsel under the Fourth, Sixth and Fourteenth Amendments to the Constitution of the United States and the law of the land clause of the Constitution of North Carolina.

(d) ASSIGNMENT OF ERROR 6, EXCEPTION NO. 8 (R p 27)

Robert Henry McDowell did not voluntarily submit to having his picture made. He did not know it was for identification purposes. The State has not shown that he has waived his Fourth, Sixth and Fourteenth Amendment rights under the United States Constitution to that photograph and its use. STATE v ACCOR, 277 NC 65, 175 SE 2d 583 (1970), requires such and requires the State to establish this by the evidence. The State has not and the findings in the suppression Order do not conclude that it has nor do they support the conclusions that it has (R p 26). The second appeal in STATE v ACCOR, 281 NC 287, 188 SE 2d 332 (1972), does not change this holding, it emphasizes that such findings as voluntariness, the establishment of waiver and the independent basis must be shown.

The person of Robert Henry McDowell is a suppressable fruit of official misconduct. This is the reserved

question in Part 11-D of U.S. v CREWS, US #78-777-48 LW 4324 (March 25, 1980), in the majority opinion. The identification should have been suppressed.

All relevant arguments on all phases of this suppression are incorporated in each assignment by reference.

III. ROBERT HENRY McDOWELL WAS PREJUDICED BY NOT BEING PERMITTED TO MAKE AN OPENING STATEMENT.
ASSIGNMENT OF ERROR 7, EXCEPTION NO. 9 (R p 27).

GS 15A-1221 sets out the order of proceedings in a jury trial. Subsection (4) provides that each party must be given the opportunity to make an opening statement. The defendant did not have this opportunity. It is mandatory jurors in the selection process come to the defendant in a capital case only after they are death qualified. This procedure gives the defendant a chance to offset and counteract the discussions by the Court and the State. That the Court did not afford the defendant this right or required the defendant to ask for it and such puts the defendant at a disadvantage and is therefore prejudicial. North Carolina General Statute 15A-1221(4) clearly affords to the defendant the right to make an opening statement, and that right was effectively denied in this case. This denial was an error of law resulting in prejudice to defendant in that he had no opportunity to apprise the jurors about the case from his point of view and what to look and listen for on behalf of defendant.

IV. ROBERT HENRY McDOWELL WAS MATERIALLY PREJUDICED IN HIS TRIAL BY THE FAILURE OF THE COURT TO PERMIT JOHN EARL MASON TO TESTIFY CONCERNING CLIFF FERGUSON'S DEATH.
ASSIGNMENT OF ERROR 8, EXCEPTION NO. 12 (R p 31).

Mr. Mason had testified his wife called Cliff to see where Terry was. Terry was the mother of the deceased child (R p 30). He testified that he was a friend Terry "knowed". When defendant tried to establish that he was murdered the next day, the State's exception was sustained. This was the person Mr. Mason was to call if Terry was needed (R p 31). From the response in the absence of the jury, it

appears that Mr. Ferguson was a black man who was dead. Mr. Mason heard of his death the Sunday night after the death of Patsy (actually Carol) (R p 33). The coincidence of both deaths, the facts of the connection with the mother of the deceased in both instances were relevant and material facts to be presented in the case. Such would give the jury a picture of the people and make it aware that they were in the orbit of violence and violent activity. Why that night the mother would have left word is an interesting speculation. The same officers investigated both deaths. The matters were connected in fact. There was a nexus in Terry Hinson, mother of Carol. This was a legitimate area of inquiry and the jury should have been permitted to hear this evidence and draw conclusions or blanks from it. It seems that there is no prejudice implicit in the answer to a party, only the State's case. It should be competent to show that one closely connected was killed violently. Its weight and effect was for the jury. See 1 Stansbury's NORTH CAROLINA EVIDENCE, Secs. 77, 78 and 79 (Brandis rev. 1973).

V. ROBERT HENRY McDOWELL WAS MATERIALLY PREJUDICED IN HIS TRIAL BY THE FAILURE OF THE COURT TO PERMIT DEFENDANT'S COUNSEL TO CROSS EXAMINE JOHN EARL MASON, PATSY ANN MASON'S FATHER AND CAROL ANN HINSON'S STEP-GRANDPARENT, WITH RESPECT TO LIFE INSURANCE ON CAROL ANN HINSON'S LIFE.

ASSIGNMENT OF ERROR 9, EXCEPTION NO. 13 (R p 32).

This inquiry was to determine who, if anyone, would profit from Carol Ann Hinson's death. Mr. Mason, as a step-grandparent, did not have an apparent insurable interest in Carol's life (R p 30). 7 NC Index 3d Insurance, Section 12. The 4-year-old child likely did not insure herself in Mr. Mason's favor. According to Mr. Mason, he was on the scene at the house. According to his testimony, in the absence of the jury, the insurance on Carol Ann Hinson's life paid him $5,000.00 (R p 33). This would appear relevant on the question of Mr. Mason's possible motive or intent. See 1 Stansbury's NORTH CAROLINA EVIDENCE, Sec. 83 (Brandis rev. 1973). This warrants a new trial.

VI. ROBERT HENRY McDOWELL WAS MATERIALLY PRE-

JUDICED BY THE ADMISSION OF THE IDENTITY EVIDENCE OVER OBJECTION AND WITHOUT A REQUESTED VOIR DIRE.

ASSIGNMENT OF ERROR 10, EXCEPTION NO. 20 (R p 42); EXCEPTION NO. 21 (R p 42); EXCEPTION NO. 22 (R p 43); EXCEPTION NO. 23 (R p 43); EXCEPTION NO. 24 (R p 43); EXCEPTION NO. 25 (R p 43); EXCEPTION NO. 26 (R p 44); EXCEPTION NO. 27 (R p 44).

It is important to note at the outset that Patsy Ann Mason did not testify at the Suppression Hearing (R pp 7-21). There is no finding or testimony as to the time she was in the presence of her assailant, the light in the room, any identifying characteristics, acquaintance and other relevant, factual and constitutional matters with respect to her identity testimony. No chance was afforded defendant to determine her acquaintance with any or all of the black males whose photographs appeared in the two manila folders which were prepared with the defendant's picture and the pictures of 13 others. When she began her testimony in this regard the defendant objected and specially requested that counsel be allowed to voir dire, EXCEPTION 23 (R p 43). By the various objections which constitute ASSIGNMENT 10 defendant objected to the identification evidence, requested the voir dire and moved to strike the identifications which were made of the defendant. This failure to permit the voir dire and the failure to find the facts with respect to the identification and the constitutional rights of the defendant is error justifying a new trial. This is a capital case which would require pursuant to STATE v WADDELL, 289 NC 19, 220 SE 2d 293 (1975), an inquiry if the exceptions were not taken. This proposition has recently been treated at large in STATE v ACCOR AND MOORE, 277 NC 65, 175 SE 2d 583 (1970), which provides on p 79:

> "When the State offers a witness whose testimony tends to identify the defendant as the person who committed the crime charged in the indictment, and the defendant interposes timely objection and requests a voir dire or asks for an opportunity to 'qualify' the witness, such voir dire should be conducted in the absence of the jury and the competency of the evidence evaluated. Upon such hearing, if the in-court identification by a witness

is challenged on the ground it is tainted by an unlawful out-of-court photographic or corporeal identification, all relevant facts should be elicited and all factual questions determined, including those involving the defendant's constitutional rights, pertinent to the admissibility of the proffered evidence ...."

There does not appear, in this case, to be any independent basis for identification.

VII. ROBERT HENRY McDOWELL WAS MATERIALLY PREJUDICED IN HIS TRIAL BY THE SUMMARY OF THE EVIDENCE, AS GIVEN BY THE COURT, IN THE INSTRUCTIONS, AND THE FAILURE OF THE COURT TO GIVE EVIDENCE FAVORABLE TO ROBERT HENRY McDOWELL, IN THAT DEFENDANT WAS NOT GIVEN EQUAL STRESS WITH THE STATE AND FAVORABLE EVIDENCE OF DEFENDANT WAS NOT GIVEN AND THE LAW ARISING THEREON WAS NOT GIVEN.

ASSIGNMENT OF ERROR 13, EXCEPTION NO. 59 (R p 84); ASSIGNMENT OF ERROR 15, EXCEPTION NO. 61 (R p 95); ASSIGNMENT OF ERROR 16, EXCEPTION NO. 62 (R pp 95-96); ASSIGNMENT OF ERROR 17, EXCEPTION NO. 63 (R p 96).

The summary of evidence set forth on Page 84 of the Record, the subject of EXCEPTION 59, was presented as the evidence necessary to explain the law of the case (R p 78). This summary does not contain the fact that there were no bloodstains on the bicycle, the nunchukhs, on the men's undershorts; that there were none of defendant's fingerprints in the room where the attack took place; that Patsy Ann Mason wore glasses from the first grade to the seventh grade; that a sketch was made of the alleged assailant that was never offered by the State; that the nunchukhs that were State's Exhibit 8 were not the ones her assailant had (R p 48); and that the sun visor cap was on the freezer when Frances Jenkins returned home, which was before Robert returned home on the night in question (R p 51). These and other facts were raised by cross examination. It is the clear teaching of STATE v SANDERS, 298 NC 512, 259 SE 2d 258 (1979), that the failure "... to summarize, at all, evidence favorable to the defendant ... violates the clear mandate of the Statute which

requires the trial judge to state the evidence to the extent necessary to explain the application of the law thereto. In addition, he violates the requirement that equal stress be given the State and the defendant." The failure to summarize evidence which raised inferences favorable to the defendant elicited on cross examination in that case was deemed prejudicial error to the defendant. To the same effect is STATE v HEWETT, 295 NC 640, 247 SE 2d 886 (1978), which also held that GS 15A-1232 restates in substance GS 1-180 which required the judge to (1) declare and explain the law arising on the evidence; (2) to state evidence necessary to explain the application of the law thereto, and (3) give equal stress to the State and defendant in a criminal action. STATE v SANDERS, supra. This statute creates a substantial legal right; its provisions are mandatory; and a failure to comply with them is prejudicial error for which a new trial must be ordered. STATE v HEWETT, supra.

VIII. ROBERT HENRY McDOWELL WAS MATERIALLY PREJUDICED BY THE COURT EXPRESSING THE OPINION THAT THE DEFENDANT HAD OFFERED NO FAVORABLE EVIDENCE OR ANY EVIDENCE BY CROSS EXAMINATION OR OTHERWISE.

ASSIGNMENT OF ERROR 14, EXCEPTION NO. 60 (R pp 92-93).

This instruction clearly says the defendant "... has not elected to offer evidence and his decision not ... to offer evidence will create no presumption of any kind against him. 'Therefore, you must be very careful in your deliberations not to let the defendant's election to not ... offer evidence influence your decision in any way whatsoever.'" This instructs the jury that the defendant has not offered by cross examination or from the State's evidence any evidence. STATE v SANDERS, supra, declares that such is an acceptable and recognized way of producing evidence and more certainly perceives and depicts the role of counsel. This seems a clear violation of GS 15A-1222 which prohibits the expression of opinion by the judge in the presence of the jury of any fact to be decided by the jury. The language is not the charge as set in the Standard Criminal Jury Instructions and while such is not exclusive, it is persuasive. The charge, as given, is certainly not the one contemplated to

satisfy GS 8-54 which speaks only as to defendant's election not to give testimony. This expression of opinion warrants a new trial.

The defendant respectfully requests the Court to review the entire proceedings to determine if prejudicial error appears, and, if some does, to afford the defendant appropriate relief.

CONCLUSION

Wherefore, defendant prays that the denial of assistance from Johnston County at his trial, the failure to suppress the identification obtained through official misconduct, the failure to permit an opening statement by defendant's counsel, the failure of the Court to permit inquiries concerning Cliff Ferguson's death, or to cross examine John Earl Mason as to his receiving funds from Carol Ann Hinson's death, the admission of the identification of Robert Henry McDowell over an objection and without a requested voir dire, the failure of the Court to state the evidence favorable to the defendant, to give the law arising thereon and to give equal stress to defendant and plaintiff, and the expression by the Court of an opinion as to whether defendant offered evidence, or such as may appear, be found error and warrant and justify, a retrial on the guilt phase of this case.

Respectfully submitted, this 20th day of May, 1980.

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